(5)

No. 90-591

FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM B. YOUNG, JR., *et al.*,

Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

D. STUART MEIKLEJOHN
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel of Record

MICHAEL A. COOPER
JOHN E. KIRKLIN
GEOFFREY POTTER
RICHARD K. MILIN
KARL D. COOPER
TARIQ MUNDIYA
Counsel

GEORGE SOMMERS
Counsel

DOUGLAS LASDON
PATRICK HORVATH
LISA BAMBINO
LEGAL ACTION CENTER
FOR THE HOMELESS
Counsel

JANE E. BOOTH
THE LEGAL AID SOCIETY

ADAM S. COHEN
Of Counsel

November 16, 1990

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-591

WILLIAM B. YOUNG, JR., *et al.*,

Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

This case presents squarely all of the questions posed by the Petition, including the issue that is central to this case: whether begging is speech protected by the First Amendment. Respondents' assertion that the Court of Appeals' decision on this issue was "little more than dictum" is simply inaccurate. Brief of Respondents New York City Transit Authority, Metropolitan Transportation Authority and Robert Kiley In Opposition ("TA Br. Opp.") at 8. The District Court held that begging is speech fully protected by the First Amendment. *See* B22. The Court of Appeals disagreed. It held explicitly that begging is "expressive conduct" that is entitled to less than complete First Amendment protection. *See* A25-27. Judge Meskill expressly dissented from the Court of Appeals majority on this issue, stating that "begging, like charitable solicitation,

is protected speech, and therefore a direct restriction on it must be 'subjected . . . to exacting First Amendment scrutiny.'" A47 (quoting *Riley* v. *National Federation of the Blind, Inc.*, 487 U.S. 781, 789 (1988)).

The uncontradicted affidavits of petitioners (and of the now-deceased intervenor) establish that they begged peacefully. There is no dispute that all beggars, including peaceful ones, are prohibited from begging by virtue of respondents' wholesale ban. These facts crystallize the important and unresolved constitutional issue of whether solicitation of charity for one's own needs is as fully protected by the First Amendment as solicitation by an organized charity for the needs of others.

Respondents argue that this case is so closely tied to the detailed facts about begging in the New York City subway that this Court should not review it. But the Court of Appeals held that begging is not fully protected speech, no matter where it may occur. Moreover, for the reasons stated below, respondents' characterization of begging in the subway in New York does not remove this pure First Amendment issue from the case.

First, what petitioners challenge is a complete ban on peaceful begging. Petitioners do not challenge Transit Authority regulations that prohibit any begging that might be threatening or intimidating. *See* E6 (quoting 21 N.Y.C.R.R. § 1050.7(i)). And the Transit Authority never offered *any* evidence that it could not accomplish its goal of providing a safe subway system by enforcing those narrowly tailored regulations—after all, it regards the same regulations as fully adequate to control solicitation other than begging. The only regulation that petitioners challenge is the banning of begging that is *not* threatening, harassing, or intimidating—*i.e.*, peaceful begging.

Second, the Court of Appeals' factual description of the case, which is the core of respondents' argument that peaceful begging is not implicated in this case, was not the product of a searching of the record; it was an extraordinary appellate exercise in simply announcing what the "facts" were. The District Court's recognition that begging can be peaceful, *see* B38, was given no weight. The Court of Appeals held that a complete ban was narrowly tailored (although Judge Meskill dissented from this and other pronouncements about the facts in the case, *see* A45-46, A50-52), even though the District Court found there had been "no effort" at narrow tailoring. *See* B40. And the Court of Appeals adopted as conclusive a Transit Authority survey that supposedly justified the complete ban, even though the District Court did not even mention the survey, much less find that it proved that begging in the subway was inherently harmful.[1]

---

[1] Respondents attempt to justify the Court of Appeals' reliance on the survey, which had not been admitted in evidence, by stating that the Court instead relied on an affidavit describing the survey. TA Br. Opp. at 4 n.6. Respondents offer no proof for this assertion, however, and the Court of Appeals merely reports what the survey "revealed," not what its author stated about it. *See* A7. Moreover, respondents do not explain how the Court of Appeals could have determined that the affidavit or the survey were credible in view of the fact that the District Court never mentioned them. Petitioners had submitted evidence showing the survey's methodology was flawed in ways that rendered the survey useless as a basis for the conclusion that riders strongly dislike begging on the subway. *See* Record on Appeal at 258-59. If the Court of Appeals thought that the survey or the detailed facts concerning the conduct of begging in the subway were important in deciding whether to uphold respondents' ban, it should have remanded this case for the development of a factual record. In the absence of such factual development, the Court of Appeals could not and respondents cannot fairly rely on the survey as evidence.

Finally, the Transit Authority respondents' brief underscores the importance of this case and the need for this Court to address the issues it presents. When respondents point to what they say is evidence of a "national consensus that begging may indeed be banned and that to do so is not inconsistent with the First Amendment" (TA Br. Opp. at 9), they are emphasizing the national importance of the issues in this case. The newspapers report that the police are currently rounding up and arresting homeless people in the District of Columbia. Their "crime" is begging. The police say they are encouraged in their efforts by "the Federal appeals court decision in the New York City case against soliciting on the subway." (*See* New York Times, Nov. 7, 1990, at A20, col. 4.) If this Court does not act promptly to protect First Amendment rights that the Court of Appeals refused to recognize, the poorest members of our society will be subject to further assaults on their dignity as human beings.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

D. STUART MEIKLEJOHN
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel of Record

MICHAEL A. COOPER
JOHN E. KIRKLIN
GEOFFREY POTTER
RICHARD K. MILIN
KARL D. COOPER
TARIQ MUNDIYA
Counsel

DOUGLAS LASDON
PATRICK HORVATH
LISA BAMBINO
LEGAL ACTION CENTER
FOR THE HOMELESS
Counsel

JANE E. BOOTH
THE LEGAL AID SOCIETY

ADAM S. COHEN
Of Counsel

GEORGE SOMMERS
Counsel